IN THE

Supreme Court of The United States

OCTOBER TERM, 1919.

No. [redacted]274

THE SUPREME TRIBE OF BEN-HUR,
Appellant,

v.

AURELIA J. CAUBLE ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF AND ARGUMENT FOR APPELLANT.

BENJAMIN CRANE,
CHARLES M. McCABE,
SAMUEL D. MILLER,
FRANK C. DAILEY,
WILLIAM H. THOMPSON,
Attorneys for Appellant.

E. A. HARDIN PRINT, INDIANAPOLIS

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v.
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Appellees.
No. 790.

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STATEMENT OF THE CASE.

Question Involved.

Appellant, The Supreme Tribe of Ben-Hur, a fraternal beneficiary association, organized under the laws of the State of Indiana, filed its ancillary bill of complaint in the United States District Court for the District of Indiana against Aurelia J. Cauble and others, seeking to enjoin appellees (defendants), all of whom are resident of the State of Indiana, from relitigating in the state courts questions determined and decided in favor of appellant by the United States District Court for the District of Indiana, in a class

suit brought by George Balme and other non-resident members of Class A of appellant. Appellees were not named as defendants in the main case, but were members of Class A, for whose benefit George Balme and others brought and prosecuted said class suit. Appellant claimed that appellees were bound by representation by the decree in the main suit, and should be enjoined from relitigating the issues there decided in appellant's favor.

The court below dismissed appellant's bill of complaint for want of jurisdiction (Tr., p. 159), and the case is here on appeal and on a certificate of dismissal for want of jurisdiction (Tr., pp. 160 and 161).

The ground assigned by the court for dismissal for want of jurisdiction was that appellees and other members of the Supreme Tribe of Ben-Hur "residing in the State of Indiana could not be bound by representation by complainants in the class suit of *Balme et al. v. The Supreme Tribe of Ben-Hur et al.*, as the presence of such Indiana members of Class A as plaintiffs would have ousted the jurisdiction of the court in the main suit, such jurisdiction being based only on diversity of citizenship and not on any Federal question, and that therefore the decree in the main case was and is not res adjudicata as to Indiana members of Class A of the Supreme Tribe of Ben-Hur."

Appellant's contention is that where a class suit was brought and prosecuted in good faith in a Federal Court in the state of defendant's residence by several hundred members of a particular class of a fraternal beneficiary society, the decree in such suit binds all the members of the class residing within and without the state; that all such members residing within the state had the right, after the class suit was commenced, to intervene, and that their

joinder as intervenors would not have ousted jurisdiction which had once attached; that a decree in a class suit necessarily binds all members of the class, especially where, as here, the interest of the members of the class in the funds of the society is indivisible.

STATEMENT OF FACTS.

Certificate of Dismissal on Jurisdictional Grounds.

The certificate of dismissal on jurisdictional grounds (omitting the caption and signature) is as follows:

> "I hereby certify that I dismissed the ancillary bill of complaint in the above cause of the *Supreme Tribe of Ben Hur vs. Aurelia J. Cauble et al.*, solely because of the lack of jurisdiction of the United States District Court for the District of Indiana to entertain said ancillary bill of complaint.
>
> "I dismissed said ancillary bill of complaint upon a motion filed by the defendants thereto and also upon my own motion.
>
> "The jurisdictional question arose as follows:
>
> "On April 16, 1912, George Balme, a citizen of the State of Kentucky, and five hundred and twenty-three other complainants residing in fifteen different states of the Union outside of the State of Indiana, and one complainant residing in the Dominion of Canada, filed their bill of complaint in the United States District Court for the District of Indiana against the Supreme Tribe of Ben-Hur, a fraternal beneficiary society organized under the laws of the State of Indiana with its principal office at Crawfordsville in said state and district aforesaid, and its officers, all citizens and residents of the State of Indiana, to enjoin what was claimed to be an unlawful use of trust funds of said defendant, Supreme Tribe of Ben-Hur in which all the complainants and other members of Class A of said Supreme Tribe of Ben-Hur had a common but indi-

visible interest, and attacking a plan of reorganization adopted by the Supreme legislative body of the Supreme Tribe of Ben-Hur to prevent threatened insolvency and disruption of said society; the suit was a class suit brought and prosecuted for the benefit of all members of Class A of said society of whom there were more than seventy thousand at the time of the commencement of said suit, to wit, April 16, 1913; an answer was filed by the defendants setting up a full answer to the facts averred in the bill of complaint; a long hearing was had before the Master, the Master filed a written report and in this report it was found that this was strictly a true class suit presenting questions of common interest to all the members of Class A and affecting their joint interests in funds and in internal management of the society, written exceptions were filed thereto both by complainants and defendants, and a final decree was entered dismissing complainants' bill of complaint for want of equity, which said decree has never been appealed from, modified or vacated, but is still in full force and effect. No Indiana members of the society intervened or were made parties to the suit by any subsequent proceeding prior to the filing of said ancillary bill in said cause.

"In 1919 the defendants to the ancillary bill, all being residents of the State of Indiana, and all having been members of said Class A of said Supreme Tribe of Ben-Hur or being beneficiaries of persons who were members of said Class A at the time of the commencement, prosecution and final decree in said cause of *Balme and others vs. Supreme Tribe of Ben-Hur and others*, commenced actions in the Circuit Court of Montgomery County, Indiana, and in the Circuit Court of Marion County, Indiana, in which they seek to relitigate questions determined in favor of the defendant, Supreme Tribe of Ben-Hur, in said suit brought by George Balme and others in the United States District Court for the District of Indiana.

"The ancillary bill of complaint filed herein seeks to enjoin the maintenance and prosecution of the actions commenced by said several defendants to the ancillary bill of complaint in the State Courts of Indiana, all of which actions were commenced subsequent to the final decree in said cause of *Balme and others vs. The Supreme Tribe of Hen-Hur*, which final decree was entered and rendered on the 1st day of July, 1915.

"That a copy of said ancillary bill, together with the motion of the defendants thereto to dismiss the same, and the order of dismissal are contained in the judgment roll filed herein, to which reference is made for a more particular description thereof, and that there is attached to said ancillary bill contained in said judgment roll a full copy of all the pleadings and procedings had in said cause of *Balme et al. vs. The Supreme Tribe of Ben-Hur et al.*, together with the report and findings of the Master and the judgment and decree of the court.

"I dismissed the ancillary bill of complaint on the ground only that members of Class A of the Supreme Tribe of Hen-Hur residing in the State of Indiana could not be bound by representation by complainants in the class suit of *Balme et al. vs. The Supreme Tribe of Ben-Hur et al.*, as the presence of such Indiana members of Class A as plaintiffs would have ousted the jurisdiction of the court in the main suit, such jurisdiction being based only on diversity of citizenship and not on any Federal question, and that therefore the decree in the main case was and is not *res adjudicata* as to Indiana members of Class A of the Supreme Tribe of Ben-Hur.

"The only question which arose on the dismissal of the ancillary bill of complaint was the question of jurisdiction, and such question of jurisdiction only, as above stated, is hereby certified to the Supreme Court of the United States for its decision thereon."

(Transcript, pp. 160 and 161.)

Complaint.

The ancillary bill of complaint alleges:

That complainant is a fraternal beneficiary association organized under the laws of Indiana, and that all of the defendants are residents of the State of Indiana.

That on April 16, 1913, George Balme and more than five hundred other complainants, all of whom were members of Class A of the Supreme Tribe of Ben-Hur, filed in the United States District Court for the District of Indiana their bill of complaint; that complainants were none of them residents of Indiana, but resided in Ohio, Kentucky, Illinois, California, Oregon, Texas, Arkansas, Alabama, Louisiana, Pensylvania, Tennessee and other states; that the defendants were all citizens and residents of Indiana, and that the defendants other than The Supreme Tribe of Ben-Hur were made defendants on account of their official connection and relation with said The Supreme Tribe of Ben-Hur. (Tr., p. 3.)

That defendants filed an answer to said bill; that by the consent of both parties said cause was referred to a master to hear the evidence and report his findings of fact and conclusions of law; that the master made his report, and both defendants and complainants excepted; that such exceptions were heard and a final decree entered dismissing the bill for want of equity; that said decree has never been appealed from, reversed, modified or vacated, but the same is in full force and effect. (Tr., pp. 4 and 5.)

That the bill of complaint in the said suit of *Balme et al. v. Supreme Tribe of Ben-Hur et al.* contained the following averment:

"Third. That each and every of your orators

is a beneficial member of said corporation in good standing, and holds a beneficial certificate or contract of insurance issued to him or her by said corporation. That the date of the beneficial certificate of each and every of your orators is prior to June 1, 1908, and that each and every of your said orators belong to class "A" of the members of said corporation. That there are now over seventy thousand members in said class "A"; that it is impracticable to join all of said class "A" members as complainants herein; that this action is instituted for the benefit of each and every class "A" member of said corporation; that the relief prayed for herein will redound to the benefit of each and every member of of said class "A"; and that the questions involved herein are of common and general interest to each and every member of said class "A".'"

(Tr., p. 5.)

That among the findings of the master was the following:

"That the number of members of Class A on the third Monday of May, 1908, the date of the convening of the biennial convention in that year was approximately 100,000; the certificates issued to said Class A members were not all literally the same and they were distinguished from each other as Schedule 1, Schedule 2, Schedule 3 and Schedule 4, with reference to date of issuance, the oldest certificates being designated as Schedule 1.

"That at the time the bill of complaint was filed there were more than seventy thousand members in said Class A; that on November 1, 1913, there were over forty thousand members in Class A; that on November 1, 1913, there were over forty thousand members in Class A; that it is and at all times since the filing of said bill of complaint has been impracticable to join all of said Class A members as parties hereto; that the questions involved herein are of

common and general interest to each and every member of said Class A."

Upon information and belief, it is alleged that there was at issue, and actually litigated, tried, determined and finally adjudged between the parties to said cause of *Balme et al. v. Supreme Tribe of Ben-Hur et al.* the following questions and propositions:

"1. The right of The Supreme Tribe of Ben-Hur, to create a new class of benefit certificate holders, known as Class B. (The membership in such society up to July 1, 1908, having been in the class thereafter to be designated as Class A); the right of said society to determine that all benefit certificates issued after July 1, 1908, should be Class B certificates, and that no Class A certificates should be issued, after said date, and no new members taken into Class A, from said time, and that all benefit certificates issued after said date should be Class B certificates, and that all new members should become members of Class B, after said date.

"2. The right of The Supreme Tribe of Ben-Hur to require members of Class B to pay different rates for their insurance from members of Class A.

"3. The right of The Supreme Tribe of Ben-Hur to require that the mortuary funds of said two classes be kept separate and distinct, and that the death losses occurring therein, should be paid out of the funds of each class respectively.

"4. The right of The Supreme Tribe of Ben-Hur to authorize members of Class A to transfer, upon a written application, therefor, to Class B, and to take with them into Class B their interest in the mortuary and other funds of the society, created, or arising prior to July 1, 1908, and requiring said Class B members to pay a monthly payment and rate in exces sof that paid by Class A members.

"5. The right of The Supreme Tribe of Ben-Hur to require members remaining in Class A, and not transferring to Class B, to pay a sufficient number of monthly payments, or assessments, to meet the death losses in Class A.

"6. The right of The Supreme Tribe of Ben-Hur to use the expense fund of said society for the purpose of creating Class B, and inducing Class A members to transfer to Class B, and of securing new members in Class B.

"7. Whether The Supreme Tribe of Ben-Hur had used the expense fund in a manner justified by its constitution and by-laws and a general examination of expenditures which had been made by said Supreme Tribe of Ben-Hur, out of its expense fund, and the purpose for which said expenditures had been made, and whether any of said expenditures were made in violation of the rights of Class A members.

"8. The right of The Supreme Tribe of Ben-Hur to use its expense fund, including all questions as to whether payments made out of said fund were equitable and just, or inequitable, wrongful and unlawful; and the question of whether the maintenance of a general expense fund, and the payment of the entire expenses of the society therefrom, was fair, just and legal.

"9. Whether The Supreme Tribe of Ben-Hur had wrongfully, or unlawfully, inaugurated a campaign to persuade and induce the members of said society belonging to Class A to give up and lapse their certificates in Class A, and to apply for and procure membership and certificates in Class B; or whether the action of said The Supreme Tribe of Ben-Hur, and its officers, in that connection, was rightful, just and equitable.

"10. The question of whether the rates in Class A, in effect prior to July 1, 1908, were adequate, or

inadequate, or whether they were sufficient to provide for the current death losses in Class A, and the expenses of the society; or whether it was necessary, in order to prevent the insolvency of The Supreme Tribe of Ben-Hur, to create a new class, and induce the members of the old class, insofar as it was possible to induce them, to transfer to the new class, and the right of the society to take all action necessary for this purpose.

"That there was also involved in said litigation, and at issue in said cause, the right of The Supreme Tribe of Ben-Hur, to make such assessments upon the members of remaining in Class A, as would provide for death losses in said Class A."

Complainant further avers upon information and belief that in said original suit it was conclusively and finally determined and adjudged that the entire plan of reorganization adopted by The Supreme Tribe of Ben-Hur was valid and effective upon all members of said Supreme Tribe of Ben-Hur, including the membership afterwards known as Class A, and including the defendants to this ancillary bill, who were members of Class A, and including also the beneficiaries of certain deceased members of said Class A who were living and were members of the society at the time of the creation of Class B. (Tr., p. 7.)

That it was also conclusively adjudged and determined that all action taken by the Supreme Tribe of Ben-Hur in connection with said plan of reorganization had been validly and lawfully taken, that all expenditures had been lawfully made and that The Supreme Tribe of Ben-Hur and its officers had acted in good faith, for the benefit of the entire membership of the order, and that they have been guilty of no diversion or unlawful misapplication of any of the funds of said society. (Tr., pp. 7 and 8.)

That said cause of *Balme et al. v. The Supreme Tribe of Ben-Hur et al.* "was an actual adversary proceeding; that it was instituted and prosecuted in good faith and with vigor; that the decree in said cause was entered after actual adverse litigation, and not by consent or connivance." (Tr., p. 8.)

The ancillary bill then alleges with particularity the commencement in state courts in Indiana by the defendants to said ancillary bill of suits or benefit certificates by the beneficiaries of deceased members of Class A, and by members of Class A to recover damages; that in all of said suits plaintiffs therein are seeking to relitigate questions conclusively adjudged against them as members of Class A of said Supreme Tribe of Ben-Hur in said main action; that they have no right to seek a redetermination of said questions, and that to permit them to do so is to destroy and nullify the decree rendered by the U. S. District Court for the District of Indiana. That in said several suits commenced in the state courts plaintiffs therein challenge the right of the defendant society to create Class B and the plan of reorganization and the action of the defendant society and its officers pursuant to such legislation, and that the questions of fact and law involved in said several causes in the state courts are the same identical questions, and none other, which were conclusively adjudged and determined against plaintiff therein (defendants to ancillary bill) in said main case. (Tr., pp. 8-11.)

That unless said several defendants to the ancillary bill are enjoined, they will prosecute said several causes of action against The Supreme Tribe of Ben-Hur; that complainant will be compelled to employ attorneys to defend it and will be compelled to relitigate the questions which have

been conclusively determined in its favor by said U. S. District Court for the District of Indiana, all to its irreparable loss and injury; that in this manner the several defendants to said ancillary bill of complaint are seeking to annul, set aside and hold for naught the decree of said court and to compel this complainant to litigate again all of said questions; that other former members of Class A residing within and without the State of Indiana are likely to institute similar suits unless defendants are enjoined.

The bill then alleges the necessity for an interlocutory injunction, and that complainant is without an adequate remedy at law.

After praying for a writ of subpoena, the prayer concludes:

> "2. That the defendants, and each of them, their agents and attorneys be restrained and enjoined until the final hearing of this cause, from the further prosecution of said causes in the Superior Court of Marion County, Indiana, and in the Montgomery Circuit Court of Montgomery County, Indiana, and from instituting, or prosecuting in any court, any cause of action, on any benefit certificates held by them, or in which they are named as beneficiaries, or to recover damages on account thereof, and from attempting to relitigate the questions adjudged and determined against them in the cause of *Balme et al. vs. The Supreme Tribe of Ben-Hur et al.*
>
> "3. That upon the final hearing of this cause, the said injunction be made permanent; and for such further and other relief in the premises, as may be required by equity and good conscience."
>
> (Tr., pages 12 and 13.)

Record in Balme v. Supreme Tribe of Ben-Hur.

Exhibit A to the ancillary bill of complaint contains the following pleas and proceedings in the original case of *Balme et al. v. Supreme Tribe of Ben-Hur et al.*:

Bill of Complaint. (Tr., pp. 14-24.)

Answer to Bill of Complaint. (Tr., pp. 25-60.)

Order of Reference. (Tr., p. 61.)

Master's Report. (Tr., pp. 62-96.)

Complainants' Exceptions Before Master to Master's Report. (Tr., pp. 96-101.)

Defendants' Exceptions Before Master to Master's Report. (Tr., pp. 101-106.)

Defendants' Exceptions to Master's Report. (Tr., pp. 106-111.)

Complainants' Exceptions to Master's Report. (Tr., pp. 111-117.)

Decree. (Tr., p. 117.)

Complaints Filed by Defendants to Ancillary Bill of Complaint.

The complaints filed by defendants to the ancillary bill of complaint are set out in the transcript as follows:

Aurelia J. Cauble v. Supreme Tribe of Ben-Hur. (Tr., pp. 120-122.)

Martha May Brown and Helen B. Burroughs v. Supreme Tribe of Ben-Hur et al. (Tr., pp. 125-132.)

O'Neal Watson et al. v. Supreme Tribe of Ben-Hur et al. (Tr., pp. 133-147.)

Motion to Dismiss Ancillary Bill.

All of the defendants to the ancillary bill of complaint, except Aurelia J. Cauble, joined in a motion to dismiss on numerous grounds, which may be thus summarized:

1. That none of the defendants to the ancillary bill were parties to the original bill, and that all of the defendants are residents of the same state as complainant, and therefore no jurisdiction exists.

2. That the Federal Court does not have jurisdiction to enjoin proceedings in the state courts, as is requested by the bill, for the reason that said proceedings are not attempting to deny the judgment and decree of the Federal Court on the original bill, the full faith and credit to which it is entitled.

3. That if these defendants were parties to the original bill of complaint, the court did not have jurisdiction because they and The Supreme Tribe of Ben-Hur are citizens of the same state.

4. That the bill is insufficient in equity because (a) complainant has an adequate remedy at law; (b) there is no multiplicity of suits, because part of the actions which the ancillary bill seeks to enjoin are to recover on benefit certificates and part are brought by members of Class A (to recover damages); that each action is separate and distinct and founded on a wholly different state of facts; that there is no similarity of issues, proof or parties; (c) that defendants were none of them parties to the original bill and are not bound by the decree; (d) that a decree and judgment of a Federal court is not and can not be an absolute bar to proceedings in a state court; that the causes of action of the several defendants to the ancillary bill did not accrue until after the decree in the original case was rendered.

5. "The decree rendered can not by an ancillary proceeding be extended to these defendants, for the reason that

they were not parties or privies to the original cause, and for the further reason that if they had been parties to the original cause, the Federal Court would not have jurisdiction of said action on the grounds of diversity of citizenship.

6. "The decree and judgment of the Federal Court in this cause is not a bar to these defendants for the reason that the Federal Court had no jurisdiction in said action to determine the equities of any parties complainant who were citizens of the State of Indiana, because in that case there would have been no diversity of citizenship as alleged in the original bill, for all of these defendants are residents of Indiana."

7. Under Equity Rule 38, the decree of the Federal Court in the original proceedings was without prejudice to the defendants named in the ancillary bill of complaint.

8. "The decree rendered in the original proceedings herein can not by ancillary proceedings be extended so as to operate in bar against citizens of Indiana who were not and could not have been complainants in the original bill in the case of *Balme et al.*"

(Tr., pp. 150-154.)

A separate motion to dismiss the bill of complaint, based on substantially the same grounds, was filed by the defendant, Aurelia J. Cauble. (Tr., p. 154.)

Dismissal of Bill Was Solely for Lack of Jurisdiction.

The decree of dismissal was not merely upon defendants' motion to dismiss, but also on the motion of the court, and it contains the following provision:

"Said dismissal being made solely on the ground of want of jurisdiction of the court to entertain said ancillary bill of complaint." (Tr., page 159.)

Specification of Errors Relied Upon.

The court erred:

First. In decreeing that said ancillary bill of complaint should be dismissed because said District Court of the United States did not have jurisdiction to entertain said ancillary bill of complaint.

Second. In not retaining jurisdiction of said ancillary bill of complaint and proceeding to a decree on the merits.

Third. In not decreeing that the final decree rendered in the United States District Court for the District of Indiana on April 16, 1913, in the main case, wherein George Balme, a citizen of Kentucky, and five hundred twenty-three (523) other complainants, residing in fifteen (15) different states of the Union outside of the State of Indiana, and one complainant residing in the Dominion of Canada, filed their bill of complaint in the United States District Court for the District of Indiana against the Supreme Tribe of Ben-Hur, a fraternal beneficiary society, organized under the laws of the State of Indiana, with its principal office at Crawfordsville, in said state and district, and its officers all citizens and residents of the State of Indiana, to enjoin what was claimed to be an unlawful use of trust funds of said defendant, The Supreme Tribe of Ben-Hur, in which all the complainants and other members of Class A of said Supreme Tribe of Ben-Hur had a common but indivisible interest, and attacking a plan of reorganization adopted by the supreme legislative body of The Supreme Tribe of Ben-Hur to prevent threatened insolvency and disruption of

said society, which suit was a class suit brought and prosecuted for the benefit of all members of Class A of said society, of which there were more than seventy thousand members at the time the suit was commenced, and in which suit an answer was filed by the defendants setting up a full answer to the facts averred in the bill of complaint, and in which there was a long hearing before the master; the master filed a written report, and in this report it was found that the suit was strictly a class suit presenting questions of common interest to all members of said Class A and affecting their joint interest in funds and in the internal management of the society, written exceptions were filed thereto both by complainants and defendants and a final decree was entered dismissing complainant's bill of complaint for want of equity, which said decree has never been appealed from, vacated or modified, but is still in full force and effect, was res adjudicata as to suits commenced after said final decree by residents of the State of Indiana, all of whom were members of said Class A of said Supreme Tribe of Ben-Hur or beneficiaries of persons who were members of said Class A at the time of the commencement, prosecution and final decree in said main case.

Fourth. In not decreeing and deciding that the final decree in the main case was binding on all members of Class A of the Supreme Tribe of Ben-Hur and the beneficiaries of deceased members, whether residing inside the State of Indiana or outside thereof.

Fifth. In not decreeing that the final decree in the main case was binding and conclusive on all Class A members of The Supreme Tribe of Ben-Hur at the time said action was commenced and maintained and at the time of

said final decree therein, including the beneficiaries of deceased members, without reference to their residence.

Sixth. In not decreeing that the final decree of the United States District Court for the District of Indiana in the main case of *Balme et al. v. The Supreme Tribe of Ben-Hur* was valid and binding on all Class A members of the Supreme Tribe of Ben-Hur and in decreeing that the Indiana members of said Class A could relitigate the questions finally adjudged against them in said main case.

Seventh. In not retaining jurisdiction of complainant's ancillary bill and deciding the same on its merits.

Eighth. In refusing to enjoin defendants to the ancillary bill of complaint from relitigating in the state court the questions decided adversely to them as members of Class A of The Supreme Tribe of Ben-Hur in the decree in the main case.

BRIEF OF ARGUMENT.

Points and Authorities.

1. Jurisdiction in the original suit of *Balme et al. v. Supreme Tribe of Ben-Hur et al.* depended solely on diversity of citizenship.

2. Complainant and defendants to the ancillary bill are all residents of Indiana, and jurisdiction is claimed because of its ancillary character, and because the decree in the main case bound all members of Class A by representation, whether named as parties or not, and whether residents or non-residents of Indiana.

3. The original cause was a true class suit brought by more than five hundred members of Class A of The Supreme Tribe of Ben-Hur on behalf of and for the benefit of all members of Class A, of which there were more than seventy thousand, to protect *an indivisible interest* which it was claimed they all had *in common* in the funds of the society. The cause was brought and tried in good faith, and a decree resulted, after actual litigation, dismissing the bill for want of equity. It is this common interest which constitutes the bond of union essential to the maintenance of such a class suit, and when it exists, the decree binds the entire class by representation, especially "Where the subject matter of the suit is common to all."

Hartford Life Ins. Co. v. Ibs., 237 U. S. 662, 672.
Royal Arcanum v. Green, 237 U. S. 531.
Foster's Federal Practice, Vol. 1 (5th Ed.), Section 114.

4. Where a suit is brought in a state court against a fraternal beneficiary association by some of its members, the decree binds all whether personally made parties or not. Such a decree made in a class suit which involved the status of the fund and the right of the members therein is res adjudicata in a second suit or a benefit certificate, even though the two causes of action are different, because the "right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

Hartford Life Ins. Co. v. Ibs, 237 U. S. 662, 673.
Southern Pacific Co. v. United States, 168 U. S. 1, 48, 49.
Forsyth v. Hammond, 166 U. S. 506, 518.

5. In assuming jurisdiction of a suit brought by members of a class claiming to represent the class in respect to an indivisible fund of a fraternal society or its internal management and prudential affairs, common to all its members, the court of necessity decides that the parties bringing the suit are representatives of the entire class, and that the suit is properly commenced as a class suit.

Hartford Life Ins Co. v. Ibs, supra.

6. Anything that can be done in a court of equity in a state court by citizens of the state suing therein can likewise be accomplished by citizens of other states of like rights suing in the Federal Court.

Williams v. Crabb, 117 Fed. (C. C. A., 7th Cir.) 193, 198, and cases cited.
Boom Co. v. Patterson, 98 U. S. 403, 407.
Payne v. Hook, 7 Wallace 425.

7. If Balme and his associates, who brought the original action in the Federal Court, had instead commenced the cause in the state court, all of the defendants to the ancillary bill who were residents of Indiana would have been bound by the decree by representation without having been made parties.

Hartford Life Ins. Co. v. Ibs, supra.

8. Section 273, Burns' Revised Statutes of Indiana 1914, provides that when a complete determination of a controversy can not be had without the presence of other parties, the court may cause them to be joined as proper parties, but it has been frequently held by the Supreme Court of Indiana that a person who has an interest in the subject matter of the suit has a right to intervene in the cause, and the settled practice in Indiana is that such persons should come in as intervening petitioners and not as coplaintiffs.

Cambria Iron Co. v. Union Trust Co., 154 Ind. 291. 296.

Barner v. Bayless, 134 Ind. 600.

Larue v. American, etc., Engine Co., 176 Ind. 609.

Upon becoming an intervenor, such person has the right to present his theory of his case to the court, but under settled equitable principles he does not become a co-plaintiff, nor does he have the right in the absence of fraud on the part of the original plaintiffs, or their refusal to prosecute the suit, to control the litigation on the original complaint, but only to control the issues joined on the intervening petition.

10. The situation is thus identical in both the state and Federal courts, because it is well settled that after

jurisdiction had attached in the Federal Court, residents of Indiana could have intervened and had their rights passed upon *without ousting the jurisdiction* of the Federal Court.

Belmont Nail Co. v. Columbia Iron & Steel Co., 46 Fed. 336.

Stewart v. Dunham, 115 U. S. 61.

Fraser v. Cole, (C. C. A., 7th Cir.) 214 Fed. 556, 561.

Payne v. Hook, 7 Wallace 425, 432.

Cyc., Vol. 11, p. 867, note 99 and p. 870.

15 C. J. 1411.

11. In a suit by creditors in the nature of a creditor's bill to subject the property of the common debtor to the payment of their debts, all creditors who make seasonable and appropriate application will be admitted.

Doherty et al. v. Holliday et al., 137 Ind. 282.

Kimball v. Whitney, 15 Ind. 280.

Butler v. Jaffray, 12 Ind. 504.

Newgass v. Atlantic R. R. Co., 72 Fed. 712.

Richmond v. Irons, 121 U. S. 27.

12. A Federal court can enjoin the relitigation in a state court of issues decided by it, and in such cases diversity of citizenship is not essential. The bill is ancillary in character.

Looney v. Eastern Texas R. R. Co., 247 U. S. 214, 221.

Riverdale Cotton Mills Co. v. Alabama, etc., Co., 111 Fed. 431, 198 U. S. 188.

Prout v. Starr, 110 Fed. 3, 188 U. S. 537.

Mercantile Trust Co. v. Roanoke, etc., Co., 109 Fed. 3.

Pell v. McCabe, 256 Fed. 512.

St. Louis, etc., Co. v. San Francisco, etc., 253 Fed. 123, 129.

13. If the Indiana members of The Supreme Tribe of Ben-Hur have the right to relitigate the questions determined in the Balme case, then the state courts have the right to reach exactly the opposite conclusion to that which was reached in the Balme case and may hold that the entire plan of reorganization of the society is wrongful, illegal and may be enjoined. The net result of this situation would be that all members outside of Indiana are conclusively bound by a decree which the society must carry out as to them, and the members in Indiana and the society would be bound by an entirely different and conflicting decree. Mutuality would thus be destroyed and the society could not obey the conflicting decrees and maintain that equality of right and duty which is the very foundation of the society's existence.

14. R. S., Section 720, does not prevent a Federal court from granting an injunction on a supplementary bill ancillary to a prior suit to restrain the prosecution of actions in a state court which would interfere with a decree in the Federal Court.

Looney v. Eastern Texas R. R. Co., 247 U. S. 214, 221.

St. Louis, etc., Co. v. McKnight, 220 Fed. 876, 244 U. S. 368.

Pell v. McCabe, 256 Fed. (C. C. A., 2nd Cir.) 512, 515, and numerous cases cited.

Krippendorf v. Hyde, 110 U. S. 276.

ARGUMENT.

The narrow question presented for consideration may be thus stated:

Is a decree entered in a true class suit brought in a Federal court by non-residents against a fraternal society in the state of its residence binding by representation on the members of such society residing within the state of the defendant's residence, although they were not actually parties to such litigation?

The facts averred in the original complaint in the Balme case, and found by the master in his report, make a true class suit. There were about seventy thousand members constituting Class A when the original suit was commenced, who were scattered throughout about thirty-two states of the Union. The questions involved were of common interest to all Class A members, who, as holders of certificates, were deeply interested in the proper management of the affairs of the society, and its very existence was involved in the controversy. The plaintiffs, some five hundred and more members of Class A, residing in fifteen states of the Union, brought the suit in behalf of themselves and all other members of Class A as a class suit. The master in his report finds:

> "That at the time the bill of complaint was filed there were more than seventy thousand members in said Class A; that on November 1, 1913, there were over forty thousand members in Class A; that it is and at all times since the filing of said bill of complaint has been impracticable to join all of said Class A members as parties hereto; that the questions

involved herein are of common and general interest to each and every member of said Class A."

The Balme case was a true class suit; the complainants therein brought the suit in behalf of all Class A members, and they represented the entire class, not any particular part of the class, but the class as a whole; the relief they were entitled to, if any, was a relief which was common to the entire class, and as a class, for if the relief demanded or the relief granted had been peculiar to any individual Class A member it would have defeated the purpose and object of the suit. In a class suit one or more may sue for all having a common interest, and it is the common interest which constitutes the bond of union essential to give the right to prosecute the suit; the suit, when thus prosecuted, is for the benefit of the whole.

> "When the question is one of a common and general interest, and one or more sue or defend for the benefit of the whole; 'and when the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole.' But there seems to be no reason for treating the two classes separately. They are called 'class suits', 'Creditors' suits', or 'stockholders' suits', as the case may be.
>
> " 'When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.' When one or more thus file a bill on behalf of themselves and others similarly interested, they should state in the title of their bill that they so sue, and show that the others are numerous or unknown. Any others of the class have the right to join with them in the suit at any time before its settlement or termination upon payment of their

> share of the costs, and counsel fees which have been then paid or incurred, provided they do not seek to act in hostility to the original complainants, in which case the court may in its discretion allow them to intervene. If their joinder as plaintiffs would oust the court of jurisdiction, they may be brought in as defendants."
>
> Sec. 114, Foster's Fed. Practice, Vol. 1, 5th Ed.

In *Hartford Life Insurance Company v. Ibs*, 237 U. S. 662, at page 672, Mr. Justice Lamar uses the following language in defining class suits:

> "For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest *to represent the entire body*, and the decree binds *all of them* the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

At the time of the commencement of the suit of Balme et al. in the United States District Court for the District of Indiana, April 16, 1913, The Supreme Tribe of Benjamin had been admitted to transact and was transacting its business in thirty-two states of the Union and the District of Columbia. At that time the society had about eighty-five thousand beneficial members outside of the State of Indiana, residing in these states outside of the State of Indiana and in the District of Columbia, who were interested in its funds and in the management of its affairs and who were interested in the questions involved in the case and therein decided. These questions concerned the distribution of its funds and the management of its prudential affairs and

were of general and common interest to all of its members.

Its members then consisted of two classes: Class A, who comprised all the beneficial members of the society on the first day of July, 1908; and Class B, which included all members admitted subsequent to said date and all the members of Class A who after that date voluntarily transferred to said Class B.

It must be conceded that these beneficial members of Class A, residing in the states of the Union outside of the State of Indiana, and in the District of Columbia, are bound and concluded by the judgment and decree rendered in this case; that these beneficial members residing outside of the State of Indiana are bound by this judgment and decree upon the ground that as the suit was a class suit, the beneficial members prosecuting the suit in behalf of the class, represented all of these non-resident beneficial members, under the doctrine of representation in a class suit; that these non-resident members outside of Indiana were fully represented by the members who were actually plaintiffs and prosecuting the action in behalf of the entire class.

That it is a class suit as to all members but those residing in the State of Indiana seems to us certain, and the fact that the Indiana members could not have been joined as either plaintiffs or defendants is urged as a sufficient reason to show that this was not, and is not, a class suit, for, if it be admitted that it is a class suit, then we contend that the United States District Court for the District of Indiana had jurisdiction of this cause when it was filed, and can retain such jurisdiction up until it entered and rendered final judgment, and the fact that Indiana members of Class A did not appear by intervention or otherwise, can not now

be held to defeat a jurisdiction which was clearly established at the time of the filing of the suit and the entry of the judgment.

The members of Class A residing in Indiana are, nevertheless, an integral part of the class, and the non-resident plaintiffs represented them as fully and to all intents and purposes as if they were outside of the state, and, for instance, in a state of which no citizen was included among the named plaintiffs, that is, that the citizens of the District of Columbia, no one of whom is included among the plaintiffs or defendants, are bound to the same extent as the citizens of Indiana, for the reason that they are all parts of the whole Class A.

As stated in the authorities referred to, a creditors' suit or a stockholders' suit is strictly analogous to a class suit. In a creditors' suit, where there are creditors in the state in which the suit is brought were not made parties, who would, by becoming parties, as effectually destroy the jurisdiction of the court as the Indiana members in this case would have destroyed it, the way suggested in preventing that result is that the jurisdiction having fully attached when the suit was begun, the resident creditors could thereafter be admitted either as plaintiffs or defendants to the litigation without injuriously affecting the jurisdiction of the court. So here, resident members of The Supreme Tribe of Ben-Hur could have been admitted as intervenors after the suit was commenced, without ousting the jurisdiction of the court, although that jurisdiction was based wholly on diverse citizenship.

The fact that the parties are interested in a question of common interest is sufficient to authorize such plaintiffs to

join in an action for relief, even though the plaintiffs' rights and interests are separate and distinct.

Where an illegal tax has been attempted to be assessed or invalid assessments have been made against the property of separate and distinct property owners, and the only question they have in common is the question as to the validity of the tax and assessment, they have the right to join in one common suit for the purpose of obtaining relief from such invalid assessment or tax.

Quick v. Templin, 42 Ind. App. 151, 154.
Heagy v. Black et al., 90 Ind. 534, 540.
Jones, Treasurer, et al. v. Rushville National Bank et al., 138 Ind. 87, 92.

The same doctrine has been applied in a case where the plaintiffs held separate and different policies of insurance, but the object of the suit was to enforce a common interest. It was held that they had the right to join as plaintiffs in bringing and prosecuting the action, which was to prevent the company from making an assessment upon its members, including the plaintiffs.

Carmen et al. v. Cornell et al., 148 Ind. 83, 89.

Likewise, where the owners of separate, distinct parcels of real estate are threatened with a common nuisance, which affects all of them alike, they have a right to join in an action to abate this nuisance and common dangers, and the common interest in the relief sought authorizes them to join in the action.

First National Bank of Mount Vernon v. Sarlls et al., 129 Ind. 201.
Tate v. Ohio, etc., R. R. Co., 10 Ind. 174.

Town of Sullivan v. Phillips, 110 Ind. 320.
Thornton on Indiana Practice 24, Notes 9, 10, 11, 12, 14, 15.

The Federal Court will not require the joinder of one who is a proper but not an indispensable party when such joinder would defeat its jurisdiction.

Cleveland Telephone Co. v. Stone, 105 Fed. 794.
Annot. 59 L. R. A. 425.
Noble v. Gadsden Land, etc., Co., 31 Southern 856, 133 Ala. 250.
Williams v. Crabb, 117 Fed. 193.

Who is an indispensably necessary party as distinguished from a proper party? One who has an interest separable in its nature in the subject of the action which may be conveniently settled therein.

Kelly v. Boettcher, 85 Fed. 55, 71, 81.
Tift v. Southern R. R. Co., 159 Fed. 555.
Jennings v. United States, 264 Fed. 399.

It would seem that such interest must be in the subject matter of the action as property or a fund and not in the common question and relief sought.

Authorities supra.

A non-resident has the right to base an action on the equity side of the Federal Court upon any state of facts which would authorize a resident to institute a like suit in the courts of his own state. If the contention of appellees in this cause is sustained it means that non-residents of Indiana, while they might maintain a class suit in the Federal Court which would adjudicate the rights of all members of the class except those residing in In-

diana, could not obtain a decree formally fixing and establishing the rights of all the members of the class, but would be remitted to the state court if they desired to maintain a complete adjudication binding upon all the members of the class. The net result of this situation is to deprive the Federal Court of jurisdiction equal with that of the state court although the parties before it are such as to confer upon it jurisdiction, and although every member of the class residing within the state can be heard if he desires, on a petition to intervene, without ousting the court's jurisdiction.

If the objection to the case of a creditors' bill or of a stockholders' suit can be met and obviated in the manner suggested, that is, if after the original jurisdiction has attached, the resident creditors or stockholder may be admitted either by petition as an intervenor, or as a defendant, or otherwise, then surely the objection made in the present case could be obviated and all real and substantial objection put at rest by admitting resident members of Class A upon their own petition or by some supplemental proceeding. In this case it is impossible to conceive how the residents of Indiana can have an interest that is not in common with all members of Class A as alleged in the bill and found by the Master, and it is only by the statement that they can have such interest that the matter becomes of any serious consequences or entitled to any consideration. If a part of a class may maintain a suit for the whole class, then the remaining members of the class are not indispensable parties, and, we insist, that in such case jurisdiction is not ousted by parties who are not indispensably necessary being admitted subsequent to the

commencement of the action, and in fact, that is frequently resorted to in practice.

Suppose that Balme and the five hundred other non-residents of the fifteen different states had brought an action in the Montgomery Circuit Court in which no citizen of Indiana had been joined as plaintiff, and in which no citizen of Indiana actually intervened, then within the rule announced in *Hartford Life Insurance Company v. Ibs*, 237 U. S. 662, and in *Royal Arcanum v. Green*, 237 U. S. 531, the judgment would have been an adjudication against all the members of the society whether residing in Indiana or outside of Indiana. This adjudication would have resulted, not because the members residing in Indiana were represented individually by the named plaintiffs, but because the named plaintiffs *"represented the entire body."* It is true that in such case the Indiana members could have intervened and been heard, but they would have been bound by representation in their absence.

To deny to the decree in the main case here the same effect, is to hold that a judgment of the Federal Court of concurrent jurisdiction is not available by way of res adjudicata to the same extent and on the same parties as a judgment of the state court.

The law is firmly settled that anything that can be done in the court of equity in the state court by citizens of the state suing therein, can likewise be accomplished by citizens of other states of like rights suing in the Federal Court.

Boom Co. v. Patterson, 98 U. S. 403, 407.
Williams v. Crabb, 117 Fed. 193, 198 and cases cited.

In the case suggested in the state court a citizen of Indiana would be bound by the judgment without being actually present in court, or a party to the record, but he would have had an opportunity to be heard if he asserted such right by a petition to intervene.

His situation in the state court is therefore identical with his situation in the Federal Court, because in the Federal Court after the filing of the bill he could intervene without ousting the jurisdiction of the court.

Belmont Nail Co. v. Columbia Iron & Steel Co., 46 Fed. 336.

Stewart v. Dunham, et al, 115 U. S. 61.

Fraser v. Cole, 214 Fed. 556, 561.

Payne v. Hook, 7 Wallace 425, 432.

In the leading case of *Stewart v. Dunham, supra*, appellees filed their bill in the chancery court in Mississippi against appellants. The cause was thereafter removed into the Circuit Court of the United States and the bill was then amended making other creditors co-complainants, which resulted in citizens of the same state being both complainants and defendants.

This court in holding that jurisdiction of the Circuit Court of the United States was not thereby ousted, said:

> "The appellants assign as error that the court proceeded to decree, after admitting Katz and Barnett and John I. Adams & Co. as co-complainants, alleging, that, as the case then stood, it was without jurisdiction, as the controversy did not appear to be wholly between citizens of different States. This, of course, could have furnished no objection to the removal of the cause from the state court, because at the time these parties had not been admitted to the cause; and their introduction afterwards as co-

complainants did not oust the jurisdiction of the court, already lawfully acquired, as between the original parties. The right of the court to proceed to decree between the appellants and the new parties did not depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. *Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing.*"

Even in a class suit in the state court, residents of Indiana could not have forced their way in as co-plaintiffs against the objection of the parties bringing the suit, and their sole right would have been by intervention just as in the Federal Court.

The following language of this court from *Hartford Life Insurance Company v. Ibs, supra*, shows that it is the policy of the law to settle all legal propositions involved in one class suit, and to make the decision of such legal questions binding on all members of the order:

"The Fund was single, but having been made up of contributions from thousands of members their interest was common. It would have been destructive of their mutual rights in the plan of Mutual Insurance to use the Mortuary Fund in one way for claims of members residing in one state and to use it in

another way as to claims of members residing in a different state. To make advances replenished by assessments against those living in Connecticut—and to make advances without the right to replenish against those living in Wisconsin—would have destroyed the very equality the assessment plan was intended to secure. Manifestly, the question as to the ownership and proper administration of the fund could *not be left at large for collateral decision in every suit on certificates held by those who had failed to pay the assessment.* For—whether the members of the 'Safety Fund Department' are regarded as occupying a position analogous to that of shareholders; or are treated as beneficiaries of trust property in the hands of the Company, as Trustee, in the State of Connecticut—the courts of that state had jurisdiction of all questions relating to the internal management of the corporation."

It is not unfair, as we see it, in determining whether the decree in the main case is res adjudicata as to all members of the society, to consider the result which would follow from a contrary holding.

If the Indiana members of the society have the right to relitigate the questions determined in the Balme case, then the courts of the state have the right to reach exactly the opposite conclusion that was reached in the Balme case, and may hold, if they see fit, that no common expense fund can be maintained, and even further may hold that the entire plan for the creation of Class B is wrongful, illegal and must be enjoined. The net result of this situation would be that all members outside of Indiana are conclusively bound by a decree which the society must carry out as to them, and the members in Indiana would be bound by an opposite decree entered in the state court. This would leave the society in a situation not only where mutuality

would be destroyed, but where it would be absolutely impossible for it to obey the two conflicting decrees and maintain that equality of right and duty which is the very foundation of the society's existence.

Equity Rule 38 adopted by the Supreme Court of the United States in 1912 reads as follows:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

Prior to 1912 this rule was qualified by the following clause, which was omitted from the revision:

> "but in such cases the decree shall be without prejudice to the rights and claims of the absent parties."
>
> See *in re Dennett*, 221 Fed (CCA 9th Circuit), 350, 355.
>
> *Coann v. Atlantic Cotton Factory Co.*, 14 Fed. 4, 8.

The omission of this qualifying clause certainly was intentional and makes the judgment in a class case more effective than it had been under the rule prior to its amendment, and we further suggest that the rule itself emphasizes the fact that this suit is brought for the class as a whole, and shows that the individual member is no longer an indispensable party, and that his rights are embraced in the class, and outside of the class he has no rights that can be made the subject of an action at law or in equity, save in exceptional instances not necessary to be here considered.

In interpreting this rule it must be further borne in mind that it was adopted with reference to actions in the

Federal Court where class suits have been frequently brought with members of the class residing in the state in which the suit was brought.

Assuming for the sake of argument that the Indiana members of Class A are not indispensable parties plaintiff in the original Balme suit for the reason that a sufficient number of Class A members are parties plaintiff to show the court that Class A will be properly protected in any decree that may be entered, the court would not admit a resident member of Class A upon a petition to be made party plaintiff, against the opposition of the other plaintiffs, if by so doing the jurisdiction of the court would be defeated. Neither would the court allow them to be made parties plaintiff if their purpose was to annoy and harass the plaintiff in the prosecution of a suit for the common benefit of all, but would require them to become parties defendant or intervenors. Therefore, if they have any interest in the class suit, they can assert it by intervention, or otherwise and it will be properly protected in the decree rendered.

BENJAMIN CRANE,
CHARLES M. MCCABE,
SAMUEL D. MILLER,
FRANK G. DAILEY,
WILLIAM H. THOMPSON,
Attorneys for Appellant.